No. 97-1489

In The

Supreme Court of the United States

October Term, 1997

YOUR HOME VISITING NURSE SERVICES, INC.,

Petitioner,

v.

SECRETARY OF HHS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 11, 1998
Certiorari Granted June 15, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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* The opinions are reproduced in the Petition for Writ of Certiorari and are therefore not reprinted in this Joint Appendix.

Proceedings include all events. TERMED
3:95cv276 Your Home Vist Nurse v. HHS 49BC
JKK
TERMED 49BC
JKK

U.S. District Court
Eastern District of Tennessee (Knoxville)

CIVIL DOCKET FOR CASE #: 95-CV-276

Your Home Vist Nurse v. HHS Filed: 05/18/95
Assigned to: Honorable Leon Jordan
Demand: $49,000 Nature of Suit: 151
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 42:1395 HHS: Adverse Reimbursement Review

5/18/95	1	COMPLAINT (Summons(es) issued), Magistrate Judge Thomas W. Phillips designated for pretrial matters (cs)
5/18/95	–	FILING FEE PAID on 5/18/95 in the amount of $120.00, receipt #001960. (cs)
5/30/95	2	RETURN OF SERVICE executed upon U. S. Attorney on 5/18/95 by personal service (cs)
5/31/95	3	RETURN OF SERVICE executed upon defendant HHS on 5/22/95, upon Attorney General 5/22/95 by cert mail (cs)
7/17/95	4	MOTION by defendant to extend time to answer C/S (cs) [Entry date 07/18/95]
7/20/95	–	ORDER by Honorable Leon Jordan granting motion to extend time to answer for additional ten days (granted in margin) [4-1] (cc: all counsel) (cs)

7/31/95	5	MOTION by defendant to dismiss or, in the alternative, for summary judgment; transcript. C/S (cs) [Entry date 08/01/95]
7/31/95	6	MEMORANDUM IN SUPPORT of motion to dismiss [5-11, of motion for summary judgment [5-2] C/S (cs) [Entry date 08/01/95]
8/23/95	7	RESPONSE by plaintiff Your Home Visting Nurse to deft's motion to dismiss or in the alternative motion for summary judgment [doc. 5], w/attachmnts C/S (dj)
9/5/95	8	MOTION by defendant HHS to extendi [sic] time to file a reply to the response of pltf to the deft's motion to dismiss C/S (crs) [Entry date 09/06/95]
9/11/95	–	ORDER by Honorable Leon Jordan granting defendant's motion for enlargement of time until 9/12/95 (granted in margin) [8-1] (cc: all counsel) (cs)
9/11/95	9	REPLY by defendant to plaintiff's response to defendant's motion to dismiss [5-1] or, in the alternative, for summary judgment [5-2] C/S (cs)
10/20/95	10	ORDER by Honorable Leon Jordan setting hearing on motion to dismiss [5-1] 9:00 11/30/95 (cc: all counsel) (jj2)
10/20/95	–	NOTICE OF HEARING on oral argument on motion to dismiss on 11/30/95 at 9:00 before Judge Jordan (cc: all counsel) (jj2)
11/30/95	11	CTRM MINUTES (USDJ Jordan): Motion hearing 11/30/95; defendant's motion to dismiss [5-1] heard and taken under advisement; order to follow. Gail Preston,

DC; Netta Kocuba, CR. (cs) [Entry date 12/01/95]

3/22/96	12	MEMORANDUM OPINION by Honorable Leon Jordan in support of the following order (cc: all counsel) (cs)
3/22/96	13	ORDER by Honorable Leon Jordan granting defendant's motion to dismiss [5-1] or for summary judgment [5-2] dismissing all claims against defendant. OB 158 Pg 40 (cc: all counsel) (cs)
4/10/96	14	NOTICE OF APPEAL by plaintiff from Dist. Court decision entered 3/22/96, dismissing plaintiff's claims (cc: all counsel) (cs) [Entry date 04/11/96]
4/10/96	–	RECEIVED re [14-1] fee in amount of $105.00 (Receipt #003470) (cs) [Entry date 04/11/96]
4/11/96	15	TRANSCRIPT Order by plaintiff Your Home Vist Nurse for dates: 11/30/95 (cs)
4/12/96	–	TRANSMISSION FORM – forwarding certified copies of notice of appeal, updated docket entries to USCA: [14-1] (cc: all counsel, i.e. Diana L. Gustin, 800 South Gay Street, Suite 2001, Knoxville, TN 37929; D. Gregory Weddle, Office of the U S Attorney, P O Box 872, Knoxville, TN 37901-0872; and Howard H Lewis, SSA Regional Counsel, 101 Marietta Tower, Suite 521, Atlanta, GA 30323) (cs)
4/16/96	16	TRANSCRIPT of proceedings held on 11/30/95 before the Honorable Leon Jordan, CR N. Kocuba. (cs) [Entry date 04/18/96]

4/19/96	17	DESIGNATION OF RECORD by plaintiff C/S (cs)
4/29/96	–	NOTIFICATION by Circuit Court of Appellate Docket Number 96-5525 (cs)
4/15/97	–	RECORD on Appeal sent to USCA re [14-1] (cc: all counsel) (jn)
2/23/98	18	JUDGMENT from USCA affirming the decision of the District Court [14-1] attached is a copy of the Full Text Publication (jn) [Entry date 02/24/98]
3/3/98	–	RECORD on appeal returned from USCA (aa)
3/23/98	–	LETTER from Supreme Court of the U.S. stating that the petition for a writ of certiorari was filed on 3/11/98 and place on the docket the same day as No. 97-1489 (dj) [Entry date 03/24/98]

General Docket
Sixth Circuit Court of Appeals

96-5525

Filed: 4/24/96

Court of Appeals Docket #: 96-5525
Nsuit: 2151 Contract: Recovery Medicare
Your Home Visiting v. HHS

Appeal from: Eastern District of Tennessee at Knoxville

Case Type information:

1) Civil
2) United States Party
3) federal question

Lower court information:

District: 0649-3: 95-00276
Court Reporter: Donnetta Kocuba
Trial Judge: Leon Jordan, District Judge
Date Filed: 5/18/95
Date order/judgment: 3/22/96
Date NOA filed: 4/10/96

Fee status: paid

Prior cases:

None

Current cases:

None

YOUR HOME VISITING NURSE SERVICES, INC.
Plaintiff - Appellant

v.

SECRETARY OF HEALTH AND HUMAN SERVICES
Defendant - Appellee

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Knoxville, TN 37902

4/24/96 Civil Case Docketed. Notice filed by Appellant Your Home Visiting. Transcript needed: y (pje)

4/24/96 TRANSCRIPT ORDER FORM filed by Diane L. Gustin for Appellant Your Home Visiting: court reporter Donnetta Kocuba, transcript ordered on 4/10/96 [96-5525] [1316117-1] response due by 5/6/96 for Donnetta Kocuba [96-5525] (blh)

4/25/96 TRANSCRIPT ORDER completed by court reporter Donnetta Kocuba for Document [1316117-1] transcript involving, Diane L. Gustin, Donnetta Kocuba. Number of pages: 25 (1 vol) filed in DC on 4/16/96. [96-5525] (blh)

5/1/96 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 6/10/96; appellee brief and administrative record in lieu of appendix due 7/10/96; reply brief due 7/24/96 [96-5525] (pje)

5/7/96 APPEARANCE filed by Attorney Diane L. Gustin for Appellant Your Home Visiting [96-5525] (pje)

5/7/96 PRE-ARGUMENT STATEMENT filed by Diane L. Gustin for Appellant YOUR HOME VISITING [96-5525] (pje)

5/8/96 APPEARANCE filed by Attorney D. Gregory Weddle for Appellee HHS [96-5525] (pje)

5/8/96 APPEARANCE filed by Attorney Howard H. Lewis for Appellee HHS [96-5525] (pje)

5/13/96 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting briefing schedule: appellant brief due now 6/20/96; appellee brief now due 7/22/96; reply now due 8/5/96 appendix now due 8/12/96 [96-5525] . (trm)

5/22/96 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting briefing schedule: appellant brief due now 7/5/96; appellee brief now due 8/5/96; reply now due 8/19/96; appendix now due 8/26/96 [96-5525] . (trm)

6/10/96 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting briefing schedule: appellant brief due now 7/19/96; appellee brief now due 8/19/96; reply now due 9/3/96; appendix now due 9/10/96 [96-5525] . (trm)

7/9/96 Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting briefing schedule: appellant brief due now 8/2/96; appellee brief now due 9/3/96; reply brief now due 9/17/96; appendix now due 9/24/96 [96-5525] . (wjr)

7/18/96 Pre-Argument Conference work complete. (wjr)

8/1/96 BRIEF filed by Diane L. Gustin for Appellant Your Home Visiting. Copies: 5. Certificate of service date 7/31/96 Number of Pages: 37. [96-5525] (teb)

8/1/96 Request to require oral argument filed by Diane L. Gustin for Appellant Your Home Visiting [96-5525] (teb)

8/1/96 BRIEFING LETTER SENT requesting brief corrections from Diane L. Gustin because of references, cover, exhibits. Corrections due: 8/15/96. (teb)

8/13/96 Corrected appellant brief filed by Diane L. Gustin. Copies: 5. Certificate of Service date 8/12/96 [96-5525] (teb)

9/3/96 BRIEF filed by Howard H. Lewis for Appellee HHS. Copies: 6. Certificate of service date 8/31/96. Number of Pages: 35. [96-5525] (teb)

9/3/96 Request to waive oral argument and submit case on the briefs, (waiver on page: 1), filed

by Howard H. Lewis for Appellees HHS [96-5525] (teb)

9/17/96 REPLY BRIEF filed by Diane L. Gustin for Appellant Your Home Visiting Copies: 5. Certificate of service date 9/16/96 [96-5525] (teb)

9/26/96 APPENDIX filed by Diane L. Gustin for Appellant. Copies: 5. Certificate of Service date 9/23/96 [96-5525] (pje)

4/3/97 Appellant MOTION to request addition of document as exhibit (documents not part of lower court record) filed by Diane L. Gustin for Appellant Your Home Visiting. Certificate of service date 3/31/97 [96-5525] (pje)

4/8/97 Oral argument date set for 6/5/97 in court room 403. Notice of argument sent to counsel. [96-5525] (paw)

4/10/97 Appellee's RESPONSE in opposition to appellant's motion to request addition of document as exhibit previously filed by Diane L. Gustin for the appellant. Response from Howard H. Lewis for Appellee HHS. Certificate of service date 4/9/97 [96-5525] (pje)

4/17/97 CERTIFIED RECORD filed. Volumes include 1 tr; 1 Pl. [96-5525] (mrs)

4/17/97 ORDER filed referring to hearing panel appellant's motion to request addition of document as an exhibit filed by Diane L. Gustin and appellee's response in opposition thereto. [96-5525] Entered by order of the court. (pje)

5/23/97 ADDITIONAL CITATION filed by Diane L. Gustin for Appellant Your Home Visiting. Certificate of service date 5/21/97 [96-5525] (pje)

6/2//97 ADDITIONAL CITATION filed by Howard H. Lewis for Appellee HHS. Certificate of service date 5/29/97 [96-5525] (mcp)

6/5/97 CAUSE ARGUED on 6/5/97 by Diane L. Gustin for Appellant Your Home Visiting, Howard H. Lewis for Appellee HHS before Judges Lively, Merritt, Suhrheinrich. [96-5525] (paw)

12/22/97 OPINION filed: AFFIRMED, decision for publication pursuant to local rule 24 [96-5525]. Pierce Lively, Circuit Judge, Gilbert S. Merritt, Authoring Judge, Richard F. Suhrheinrich, Circuit Judge. (pje)

12/22/97 JUDGMENT: AFFIRMED. (pje)

2/20/98 MANDATE ISSUED with no cost taxed [96-5525] (pje)

2/27/98 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [96-5525] . Volumes included: 1 Pl; 1 Tr;. (mrs)

3/9/98 Record acknowledgment received from the district court. Acknowledged by: Acknowledgment date: [96-5525] (mrs)

3/16/98 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Your Home Visiting. Filed in the Supreme Court on 03-11-98. Supreme Ct. case number: 97-1489. [96-5525] (swh)

6/18/98 U.S. Supreme Court letter filed granting petition for writ of certiorari limited to Questions 1 and 2 presented by the petition. [1693813-1] filed by Your Home Visiting Nurse Services, Inc. [96-5525] . Filed in the Supreme Court on 06-15-98 (swh)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

YOUR HOME VISITING NURSE SERVICES, INC.,	)	
Plaintiff,	)	Civil Action No.
vs.	)	3:95-CV-276
DONNA E. SHALALA, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Defendant.	)	

CERTIFICATION

(Received July 10, 1995)

I, Jacqueline R. Vaughn, Acting Attorney Advisor, Health Care Financing Administration, Department of Health and Human Services, under authority delegated by the Secretary, certify that the documents attached constitute a true and accurate transcript of the official file as furnished by the Provider Reimbursement Review Board (PRRB). These documents are the records of the PRRB's denial of jurisdiction, concerning the request for hearing by Your Home Visiting Nurse Services, Inc., for fiscal year ending December 31, 1989, under Title XVIII of the Social security Act, as amended.

Date: July 6, 1995

/s/ Jacqueline R. Vaughn
Jacqueline R. Vaughn

YOUR HOME VISITING NURSE SERVICES, INC.

CASE NO. 95-0006G

COURT TRANSCRIPT INDEX

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PROVIDER REIMBURSEMENT REVIEW BOARD
6660 Security Boulevard
Baltimore, Maryland 21207

REFER TO
95-0006G

Location: Professional Bldg.
Room 104

CERTIFIED MAIL

MAR 14 1995

Diana L. Gustin, Esq.
Plaza Tower
Suite 2001
800 South Gay Street
Knoxville, TN 37929

RE: Your Home Visiting Nurse Services, Inc. Denial of the Reopening Group Appeal
Provider Nos. 44-H003, 44-7100, 44-7234, 44-7304
FYE 12/31/89
PRRB Case No. 95-0006G

Dear Ms. Gustin:

The enclosed correspondence was returned to the office of the Provider Reimbursement Review Board incident to your change of address. We are forwarding the original jurisdictional determination and enclosures to you at the most recent address in our computerized docket.

If you have any questions regarding this matter, please contact Melanie Marolf-Fetchik at the address above or by telephoning (410) 966-5599.

Sincerely,

/s/ Steven Kirsh
Steven Kirsh
Acting Director
Jurisdiction & Case
Management Staff

Enclosure: Letter of 1/10/95

cc: Bessie T. Wheeler, BC/BS of S. Carolina
Wilson Leong, BCBSA

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PROVIDER REIMBURSEMENT REVIEW BOARD
6660 Security Boulevard
Baltimore, Maryland 21207

REFER TO
95-0006G

Location: Professional Bldg.
Room 104

CERTIFIED MAIL

JAN 10 1995

Diana L. Gustin, Esq.
London & Amburn
1716 Clinch Avenue
Knoxville, TN 37916

Dear Ms. Gustin:

RE: Your Home Visiting Nurse Services, Inc., Denial of the Reopening Group Appeal, Provider Nos. 44-H003, 44-7100, 44-7234, 44-7304, FYE 12/31/89, PRRB Case No. 95-0006G

The Provider Reimbursement Review Board (Board) has reviewed the documentation submitted in the above-captioned case. The decision of the Board is set forth below.

Pursuant to 42 U.S.C. § 1395oo(a) and 42 C.F.R. §§ 405.1835 and .1841, a provider has a right to hearing before the Board with respect to costs claimed on a timely filed cost report if it is dissatisfied with the final determination of the Intermediary, the threshold amount of $50,000 required for Board jurisdiction over a group appeal has been met, and the request for hearing is filed within 180 days of the date of the final determination.

In this case, the Provider filed an appeal within 180 days from the date of the refusal of the Intermediary to reopen the cost report; but more than 180 days after the Notice of

Program Reimbursement (NPR) had been issued. The Board finds that it does not have jurisdiction over the Intermediary's refusal to reopen the cost report. The Board holds that 42 C.F.R. § 405.1885(c) governs the review of a denial to reopen a cost report. Section 405.1885(c) states that jurisdiction for reopening a determination rests exclusively with the administrative body that rendered the last determination. Since the Intermediary was the administrative body that rendered the last determination, it is the Intermediary's decision whether or not to reopen the cost report.

Consequently, the Board finds that it does not have jurisdiction over this appeal and hereby dismisses this case. This determination is subject to the provisions of 42 U.S.C. § 1395(f) and 42 C.F.R. § 405.1875 and .1877.

FOR THE BOARD:

/s/ Charles E. Tyler
Charles E. Tyler
Board Member

Enclosures: 42 U.S.C. § 1395(f), 42 C.F.R. §§ 405.1875 and .1877

cc: Bessie T. Wheeler, BC/BS of South Carolina Wilson Leong, BCBSA

---

§405.1877 Judicial review.

(a) General rule.

Section 1878(f) of the Act permits a provider to obtain judicial review of a final decision of the

Board, or of a reversal, affirmation, or modification by the Administrator of a Board decision, by filing a civil action pursuant to the Federal Rules of Civil Procedure within 60 days of the date on which the provider received notice of –

(1) A final decision by the Board; or

(2) Any reversal, affirmance, or modification by the Administrator.

The Board's decision is not final if the Administrator reverses, affirms or modifies the decision within 60 days of the date on which the provider received notice of the decision.

(b) Administrator declines to review a Board decision.

If the Administrator declines to review a Board decision, the provider must file its appeal within 60 days of receipt of the decision of the Board.

(c) Administrator does not act after reviewing a Board decision.

If the Administrator notifies the parties that he or she has decided to review a Board decision and then does not make a decision within the 60 days allotted for his or her review, this subsequent inaction constitutes an affirmance allowing a provider an additional 60 days in which to file for judicial review, beginning with the date the Administrator's time expires for taking action under §405.1875(g)(2).

(d) Matters not subject to judicial review.

Certain matters affecting payments to hospital under the prospective payment system are not subject to judicial review, as provided in section 1886(d)(7) of the Act and §405.1804.

(e) Group appeals.

Any action under this section by providers that are under common ownership or control (see §405.427) must be brought by the providers as a group with respect to any matter involving an issue common to the providers.

(f) Venue for appeals.

An action for judicial review must be brought in the District Court of the United States for the judicial district in which the provider is located (or, effective April 20, 1983, in an action brought jointly by several providers, the judicial district in which the greatest number of such providers are located) or in the District Court for the District of Columbia. Effective April 20, 1983, any action for judicial review by providers under common ownership or control (§405.427), must be brought by such providers as a group with respect to any matter involving an issue common to the providers.

(g) Service of process.

Process must be served as described under 45 CFR Part 4.

[41 Fr 52051, Nov. 26, 1976. Redesignated at 42 FR 52826, Sept. 30, 1977 amended at 48 FR 39836, Sept. 1, 1983; 48 FR 45774, Oct. 7, 1983]

Illegible
Reimbursement Determination and Appeals
Revised: Federal Register/Vol. 48, 196/Fr. 10-7-83

§405.1875 Administrator's review.

(a) *General rule.* (1) Except for a Board determination under § 405.1842 that it lacks the authority to decide an issue, the Administrator, at his or her discretion, may review any final decision of the Board, including a decision under § 405.1873 about the Board's jurisdiction to grant a hearing. The administrator may exercise this discretion on his or her own motion, in response to a request from a party to a Board hearing or in response to a request from HCFA.

(2) The Office of the Attorney Advisory will examine the Board's decisions, the requests made by a party or HCFA and any submission made in accordance with the provisions of this section in order to assist the Administrator in deciding whether to exercise this review authority.

(b) *Request for review.* A party or HCFA requesting the Administrator to review a Board decision must file a written request with the Administrator within 15 days of the receipt of the Board decision.

(c) *Criteria for deciding whether to review.* In deciding whether to review a Board decision, either on his or her own motion or in response to a request from a party to the hearing or HCFA, the Administrator will normally consider whether it appears that:

(1) The Board made an erroneous interpretation of law, regulation or HCFA Ruling;

(2) The Board's decision is not supported by substantial evidence; or

(3) The case presents a significant policy issue having a basis in law and regulations, and review is likely to lead to the issuance of a HCFA Ruling or other directive needed to clarify a statutory or regulatory provision;

(4) The Board has incorrectly assumed or denied jurisdiction or extended its authority to a degree not provided for by statute, regulation or HCFA Ruling; and

(5) The decision of the Board requires clarification, amplification, or an alternative legal basis for the decision.

(d) *Decision to review.* (1) Whether or not a party or HCFA has requested review, the Administrator will promptly notify the parties and HCFA whether he or she has decided to review a decision of the Board and, if so, will indicate the particular issues he or she will consider.

(2) The Administrator may decline to review a case or any issue in a case even if a party has filed a written request for review under paragraph (b) of this section.

(e) *Written submissions.* (1) Within 15 days of receipt of a notice that the Administrator has decided to review a Board decision a party or HCFA may submit to the Administrator, in writing:

(i) Proposed findings and conclusions;

(ii) Supporting views or exceptions to the Board decision;

(iii) Supporting reasons for the exceptions and proposed findings; and

(iv) A rebuttal of the other party's request for review or other submissions already filed with the Administrator.

(2) These submissions shall be limited to issues the Administrator has decided to review and confined to the record of the Board hearing.

(3) A party or HCFA, within 15 days of receipt of a notice that the Administrator has decided to review a decision, may also request that the decision be remanded and state reasons for doing so. Reasons for a request to remand may include [sic] new, substantial evidence concerning –

(i) Issues presented to the Board; and

(ii) New issues that have arisen since the case was presented to the Board.

(4) A copy of any written submission made under this paragraph shall be sent simultaneously to each other party to the Board hearing and to HCFA, if HCFA has previously –

(i) Requested that the Administrator review a Board decision or filed a written submission in response to a party's request for review.

(ii) Responded to a party's request for review; or

(iii) Submitted material after the Administrator has announced that he or she will review a Board decision.

(f) *Ex parte communications prohibited.* All communications from any of the parties or HCFA about a Board decision being reviewed by the Administrator must be in

writing and must contain a certification that copies have been served on the parties and HCFA, as appropriate. The Administrator will not consider any communication that does not meet these requirements or is not submitted within the required time limits.

(g) *Administrator's decision.* (1) If the Administrator has notified the parties and HCFA that he or she has decided to review a Board decision, the Administrator will affirm, reverse, modify or remand the case.

(2) The Administrator will make this decision within 60 days after the provider received notification of the Board decision and will promptly mail a copy of the decision to each party and to HCFA.

(3) Any decision other than to remand will be confined to –

(i) The record of the Board, as forwarded by the Board;

(ii) * * *

(iii) Generally known facts that are not subject to reasonable dispute.

(4) The Administrator may rely on prior decisions of the Board, the Administrator and the courts, and other applicable law, whether or not cited by the parties and HCFA.

(h) *Remand.* (1) A remand to the Board by the Administrator vacates the Board's decision.

(2) The Administrator may direct the Board to take further action with respect to the development of additional

facts, new issues, or to consider the applicability of laws or regulations other than those considered by the Board. The following are not acceptable bases for remand –

(i) Presentation of evidence existing at the time of the Board hearing that was known or reasonably could have been known;

(ii) Introduction of a favorable court case that was either not available in print at the time of the Board hearing or was decided after the Board hearing;

(iii) Change of a party's representation before the Board;

(iv) Presentation of an alternative legal basis concerning an issue in dispute; or

(v) Attempted retraction of a waiver of a right made before or at the Board hearing.

(3) After remand, the Board will take the action requested in the remand action and issue a new decision.

(4) The new decision will be final unless the Administrator reverses, affirms, modifies, or against remands the decision in accordance with the provisions of the section.

Finality of decision; judicial review; determinations of Board authority; jurisdiction; venue; interest on amount in controversy

(1) A decision of the Board shall be final unless the Secretary, on his own motion, and within 60 days

after the provider of services is notified of the Board's decision, reverses, affirms, or modifies the Board's decision. Providers shall have the right to obtain judicial review of any final decision of the Board, or of any reversal, affirmance, or modification by the Secretary, by a civil action commenced within 60 days of the date on which notice of any final decision by the Board or of any reversal affirmance, or modification by the Secretary is received. Providers shall also have the right to obtain judicial review of any action of the fiscal intermediary which involves a question of law or regulations relevant to the matters in controversy whenever the Board determines (on its own motion or at the request of a provider of services as described in the following sentence) that it is without authority to decide the question, by a civil action commenced within sixty days of the date on which notification of such determination is received. If a provider of services may obtain a hearing under subsection (a) of this section and has filed a request for such a hearing, such provider may file a request for a determination by the Board of its authority to decide the question of law or regulations relevant to the matters in controversy (accompanied by such documents and materials as the Board shall require for purposes of rendering such determination). The Board shall render such determination in writing within thirty days after the Board receives the request and such accompanying documents and materials, and the determination shall be considered a final decision and not subject to review by the Secretary. If the Board fails to render such determination within such period, the provider may bring a civil action (within sixty days of the end of such period) with respect to the matter in controversy contained in such request for a hearing. Such action shall be brought in the district court

of the United States for the judicial district in which the provider is located (or, in an action brought jointly by several providers, the judicial district in which the greatest number of such providers are located) or in the District Court for the District of Columbia and shall be tried pursuant to the applicable provisions under chapter 7 of title 5 notwithstanding any other provisions in section 405 of this title. Any appeal to the Board or action for judicial review by providers which are under common ownership or control or which have obtained a hearing under subsection (b) of this section must be brought by such providers as a group with respect to any matter involving an issue * * *

(2) Where a provider seeks judicial review pursuant to paragraph (1), the amount in controversy shall be subject to annual interest beginning on the first day of the fiscal month beginning after the 180-day period as determined pursuant to subsection (a)(3) of this section and equal the rate of return on equity capital established by regulation pursuant to section 1395x(v)(1)(B) of this title as in effect at the time the civil action authorized and paragraph (1) is commenced, to be awarded by the reviewing court in favor of the prevailing party.

(3) No interest awarded pursuant to paragraph (2) shall be deemed income or cost for the purposes of determining reimbursement due providers under this chapter.

LONDON & AMBURN, P.C.

ATTORNEYS AND COUNSELORS AT LAW
1716 CLINCH AVENUE
KNOXVILLE, TENNESSEE 37916
TELEPHONE (615) 637-0203
TELEFAX (615) 637-4850

[Names Omitted In Printing]

October 14, 1994

VIA CERTIFIED MAIL NO. Z 150 274 778

Provider Reimbursement Review Board
Department of Health and Human Services
6660 Security Blvd.
Baltimore, Maryland 21207

Re: Your Home Visiting Nurse Services, Inc.
Providers # 44-H003, 44-7100, 44-7300, 44-7234, 44-7304
FYE 12/31/89

REQUEST FOR REVIEW OF INTERMEDIARY'S REFUSAL TO RE-OPEN COST REPORT

(Received Oct. 17, 1994)

Attention Provider Reimbursement Review Board Chairman:

This is a request for Board review of the Providers' Request for Re-opening which was denied by the Intermediary on April 21, 1994. 42 CFR Section 405.1885 specifically grants jurisdiction for reopening a determination to revise any matter at issue. In *State of Oregon v. Bowen*, U.S. court of Appeals for the Ninth Circuit, No. 86-4369, August 18, 1988, the Ninth Circuit Court recognized an

intermediary's denial of a request to reopen as a reviewable decision if the request for review of the refusal to reopen is brought within the 180-day time period set forth in Section 1878 of the Act.

Accordingly, this request for review of the Intermediary's refusal to reopen is being filed within 180 days of the Intermediary's refusal to reopen. Attached hereto in support of this request for review is the Request for Reopening and the attachments filed therewith, and the Intermediary's response to that request.

The Providers assert that the refusal to reopen is an abuse of discretion in that there is new and material evidence which was presented to Blue Cross and Blue Shield of South Carolina, the present Intermediary, which shows that a clear and obvious error was made in the determination of the allowable amounts of owners compensation for 12/31/89.

The Providers assert that the determination was inconsistent with the law, regulations and rulings and general instructions in that the base rate of owners' compensation set by Blue Cross and Blue Shield of Tennessee, the previous Intermediary, and then followed by the present Intermediary, did not use comparable salary data it had in its possession for home office officers of a chain operations when setting the allowable salary for the home office officers (owners) of Your Home Visiting Nurse Services, Inc., which is and was in 1989 a chain of home health care agencies.

This information was not known by the Providers until 1994 during negotiations with Blue Cross and Blue Shield of South Carolina in regard to the owners compensation

issue. During conversations with personnel from Blue Cross and Blue Shield of Tennessee it was revealed that Your Home Visiting Nurse Services, Inc was treated like a large home health agency as opposed to a chain operation with a home office for purposes of calculating the allowable amount of owners compensation.

Based upon this newly discovered evidence, the request for reopening was made. This request was denied, which the Providers assert was an abuse of discretion which prompted this request for Board review.

Respectfully submitted,

/s/ Diana L. Gustin
Diana L. Gustin

Enclosures

cc: Blue Cross and Blue Shield of South Carolina
Betty Leake, YHVNS

Medicare

Audit and Reimbursement
Post Office Box 100190
Columbia, South Carolina 29202

April 21, 1994

Ms. Diana L. Gustin
London & Amburn, P.C.
1716 Clinch Avenue
Knoxville, Tennessee 37916

Re: Your Home Visiting Nurse Service, Inc.
Provider No: 44-7100, 44-7300, 44-7234, 44-7304
FYE: December 31, 1989

(Received Oct. 17, 1994)

Dear Ms. Gustin:

I am writing in response to your letter of March 28, 1994, which was addressed to Bruce Hughes. In this letter, you requested a reopening of the 1989 cost reports of Your Home Visiting Nurse Service, Inc., to increase the amount of owners' compensation. The compensation contained on the settled cost reports is the amount that was initially claimed when the cost reports were filed.

A request for reopening can be granted for several reasons. These reasons, as stated in Section 2931.2 of HCFA Publication 15-1, are:

> new and material evidence has been submitted, or a clear and obvious error was made, or the determination is found to be inconsistent with the law, regulations and rulings, or general instructions.

Your request for reopening is denied. The manner in which the home office cost statement was filed was not inconsistent with the law, regulations and rulings or general instructions. A clear and obvious error was not made when these cost reports were filed. And, new and material evidence has not been presented to establish that the compensation claimed was inappropriate.

If you have any questions, you may contact me at (803) 788-0222, extension 1252.

Sincerely,

/s/ Jim Peebles
Jim Peebles
Audit Manager
Medicare Audit and Reimbursement

cc: Bruce Hughes, Medicare Administration
Sharon Roberts, Medicare Audit and Reimbursement
Bessie Wheeler, Medicare Audit and Reimbursement
Pat Anderson, Medicare Audit and Reimbursement

LONDON & AMBURN, P.C.

ATTORNEYS AND COUNSELORS AT LAW
1716 CLINCH AVENUE
KNOXVILLE, TENNESSEE 37916
TELEPHONE (615) 637-0203
TELEFAX (615) 637-4850

[Names Omitted In Printing]

TO: Bruce Hughes
FROM: Diana L. Gustin FAXPHONE # (803) 788-8240
DATE: 03/28/94
TIME: 3:40 p.m. TOTAL NUMBER PAGES (INCLUDING COVER PAGE): 4

COMMENTS: See attached correspondence.

Please report any problems in transmission to (615) 637-0203

Confidentiality Clause

The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient;, you are hereby notified that any dissemination, distribution or copying of this telecopy is prohibited. If you have received this telecopy in error, please immediately notify us by telephone and return the original message to us at the address above via the United States Postal service. We will reimburse for the cost of postage.

Thank you

FAXFORM

LONDON & AMBURN, P.C.
ATTORNEYS AND COUNSELORS AT LAW
1716 CLINCH AVE.
KNOXVILLE, TENNESSEE 37916
TELEPHONE (615) 637-0203
TELEFAX (615) 637-4850

[Names Omitted In Printing]

March 28, 1994

VIA FAX AND FEDERAL EXPRESS

Mr. Bruce Hughes
Medicare Audit & Reimbursement
Blue Cross & Blue Shield of South Carolina
P.O. Box 100190
Columbia, South Carolina 29202

Re: Your Home Visiting Nurse Services, Inc.
Provider # 44-H003, 44-7100, 44-7300, 44-7234, 44-7304
FYE 12/31/89
PROVIDERS' REQUEST FOR REOPENING

Dear Mr. Hughes,

I am writing on behalf of the above captioned providers and their home office. These providers are presently negotiating with staff at Blue Cross and Blue Shield of South Carolina regarding owners' compensation at issue for 12/31/87, 12/31/90, 12/31/91, 12/31/92, 12/31/93 and the current year of 12/31/94. During the course of

negotiations it was established that the first year BCBS/SC audited this provider, FYE 12/31/87, certain information from BCBS/TN was used and relied upon by BCBS/SC to make certain audit adjustments. Unbeknownst to the providers at that time, BCBS/TN had knowledge and additional information, which has been described as an informal survey for reasonable compensation for home office officers of home health agency chains, which was relied upon in establishing reasonable compensation for other home health agency owners. Although this information was used by BCBS/TN to establish allowable compensation for *some* home health agency owner's compensation, it was not used when allowable compensation for the above captioned providers' owners salary was determined. Based upon the failure of BCBS/TN to use the available data, the auditors at BCBS/SC made an adjustment to YHVNS to providers which resulted in the home office officers owners compensation at YHVNS being below the amount considered reasonable for other home office officers salary.

The 1987 cost report was closed using an audit adjustment to decrease owners' compensation. The 1989 cost report was prepared after the 1987 cost report was closed. Based upon the auditors adjustments to owners' compensation for the 1987 cost report, the owners listed an amount of compensation as "PROTESTED" on the 1989 cost report.

The providers hereby request re-opening of the 1989 cost report to recompute the allowable owners' compensation based upon the home office officers salary range which

was being used by BCBS/TN for other home health agencies in the State of Tennessee. Attachments to support this request are included in your Federal Express package.

42 Code of Federal Regulations Section 405.1885

REOPENING A DETERMINATION OR DECISION

> (a) A determination of an intermediary, a decision by a hearing officer or panel of hearing officers, a decision by the Board, or a decision of the Secretary may be reopened with respect to findings on matters at issue in such determination or decision, by such intermediary officer or panel of hearing officers, Board, or Secretary, as the case may be either on motion of such intermediary officer or panel of hearing officers, Board, or Secretary, *or on the motion of the provider affected by such determination* or decision to revise any matter in issue at any such proceedings. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3 year period except as provided in paragraphs (d) and (e) of this section.

(emphasis added)

Please contact me upon receipt of this letter to advise of your response to this REQUEST FOR REOPENING. I look forward to working with you in resolving this matter.

Sincerely,

/s/ Diana L. Gustin
Diana L. Gustin

Enclosures

cc: Mr. William R. Horton, Vice President of Medicare Operations
Mr. Jim Peebles, Manager of Medicare Audit & Reimbursement
Mr. Gary Bowers, Bowers & Associates, C.P.A.
Mrs. Betty Leake, Your Home Visiting Nurse Services, Inc.

Medicare

300 Arbor Lake Drive, Suite 900
Columbia, South Carolina 29223

March 29, 1991

Ms. Betty S. Leake
Your Home Visiting Nurse Service
5703-A Broadway
Knoxville, Tennessee 37918

RE: NOTICE OF AMOUNT OF MEDICARE PROGRAM REIMBURSEMENT FOR YOUR HOME VISITING NURSE SERVICE COST REPORTING FISCAL YEAR ENDED DECEMBER 31, 1989 PROVIDER NUMBER 44-7300

Dear Ms. Leake:

In accordance with Title 42 of the Code of Federal Regulations (42 CFR), Section 405.1803, this is your Notice of Amount of Medicare Program Reimbursement for the cost reporting period indicated above.

The issuance of this Notice establishes the date of the intermediary's determination of the amount of program

reimbursement for the indicated cost reporting period. Under 42 CFR 405.1885 this determination is subject to reopening by the intermediary, either on its own motion or at your request, at any time within three (3) years from the date of this determination to correct the amount of program reimbursement as reflected on page two of this notice. This determination may not be reopened after the expiration of this three (3) year period except as provided in 42 CFR 405.1885.(d).

The adjustments which produce a difference between the intermediary's determination and your initial cost report are explained on the enclosed adjustment report. The adjustment report reflects the individual adjustments made to your cost report and includes appropriate references to and citations of applicable law, regulations and general program instructions used as the basis for these adjustments. If you have any questions concerning the nature of these adjustments or the reasons for them, please contact this office.

As a result of our examination of this cost report, our determination of your Medicare reimbursement for the indicated period is as follows:

Notice of Program Reimbursement
Page Two

Your Home Visiting Nurse Service 44-7300 FYE 12/31/89	INTERMEDIARY DETERMINATION	PROVIDER'S INITIAL REPORT	DIFFERENCE (DECREASE)
HCFA 1728-86, Wkst. B, L. 29, Col. 6	$ 373,534	$ 383,278	$ (9,744)
TOTAL ALLOWABLE COST	$ 373,534	$ 383,278	$ (9,744)
HCFA 1728, Sch. D, Line 26A, Col. 1	$ 324,514	$ 359,171	$(34,657)
HCFA 1728, Sch. D, Line 26A, Col. 2	10,968	7,724	3,244
Sequestration Adjustment	(1,462)	(1,505)	43
Protested Amounts	-0-	5,675	(5,675)
TOTAL MEDICARE REIMBURSABLE COST	$ 334,020	$ 371,065	$(37,045)
Less Amount Received and Receivable Through Interim Payments:			
HCFA 1728, Sch. D, Line 27, Col. 1	$ 345,975	$ 345,975	$ -0-
HCFA 1728, Sch. D, Line 27, Col. 2	-0-	-0-	-0-
TOTAL INTERIM PAYMENTS	$ 345,975	$ 345,975	$ -0-
Amount Due Provider (Program) Per Cost Report	$ (11,955)	$ 25,090	$(37,045)
Lump-Sum Adjustments Previous Settlements	5,166		
NET AMOUNT DUE PROVIDER (PROGRAM)	$ (6,789)		

HHA1728.86

If you are dissatisfied with out determination and the amount of program reimbursement in controversy is at least $1,000.00, you have the right to appeal our determination. To exercise your appeal rights, a written request must be filed within one hundred and eighty (180) calendar days of the date of this Notice of Program Reimbursement. An addendum is enclosed with this letter that outlines the procedures for filing an appeal.

Enclosed you will find your copy of the revised Medicare cost report and related documents. If page two of this Notice of Program Reimbursement reflects an amount due to your facility, a check for that amount will be issued within fifteen (15) days. If an amount is due to the Medicare program, a request for repayment accompanies this notice. That letter explains the conditions governing interest assessments on amounts due to the Medicare program.

If our examination of your cost report revealed items for which we were unable to make a final determination at this time, a listing of such items is enclosed. Please review this listing carefully, as these items may result in a future correction of this Notice.

Sincerely,

/s/ John N. Dart
John N. Dart
Assistant Vice President
Medicare Audit and Reimbursement

JND:slm

Enclosures: 1. Revised Medicare Cost Report with Adjustment Report

2. Listing of Identified Items Pending Final Resolution (if applicable)
3. Procedures for filing an appeal

Medicare

300 Arbor Lake Drive, Suite 900
Columbia, South Carolina 29223

March 29, 1991

Ms. Betty S. Leake
Your Home Visiting Nurse Service
5703-A Broadway
Knoxville, Tennessee 37918

RE: NOTICE OF AMOUNT OF MEDICARE PROGRAM REIMBURSEMENT FOR YOUR HOME VISITING NURSE SERVICE COST REPORTING FISCAL YEAR ENDED DECEMBER 31, 1989 PROVIDER NUMBER 44-7304

Dear Ms. Leake:

In accordance with Title 42 of the Code of Federal Regulations (42 CFR), Section 405.1803, this is your Notice of Amount of Medicare Program Reimbursement for the cost reporting period indicated above.

The issuance of this Notice establishes the date of the inter-mediary's determination of the amount of program reimbursement for the indicated cost reporting period. Under 42 CFR 405.1885 this determination is subject to reopening by the intermediary, either on its own motion or at your request, at any time within three (3) years from

the date of this determination to correct the amount of program reimbursement as reflected on page two of this notice. This determination may not be reopened after the expiration of this three (3) year period except as provided in 42 CFR 405.1885.(d).

The adjustments which produce a difference between the inter-mediary's determination and your initial cost report are explained on the enclosed adjustment report. The adjustment report reflects the individual adjustments made to your cost report and includes appropriate references to and citations of applicable law, regulations and general program instructions used as the basis for these adjustments. If you have any questions concerning the nature of these adjustments or the reasons for them, please contact this office.

As a result of our examination of this cost report, our determination of your Medicare reimbursement for the indicated period is as follows:

Notice of Program Reimbursement
Page Two

Your Home Visiting Nurse Service 44-7304 FYE 12/31/89	INTERMEDIARY DETERMINATION	PROVIDER'S INITIAL REPORT	DIFFERENCE (DECREASE)
HCFA 1728-86, Wkst. B, L. 29, Col. 6	$ 613,380	$ 627,577	$(14,197)
TOTAL ALLOWABLE COST	$ 613,380	$ 627,577	$(14,197)
HCFA 1728, Sch. D, Line 26A, Col. 1	$ 549,454	$ 617,631	$(68,177)
HCFA 1728, Sch. D, Line 26A, Col. 2	41,304	43,983	(2,679)
Sequestration Adjustment	(2,573)	(2,638)	65
Protested Amount	-0-	10,227	(10,227)
TOTAL MEDICARE REIMBURSABLE COST	$ 588,185	$ 669,203	$(81,018)
Less Amount Received and Receivable Through Interim Payments:			
HCFA 1728, Sch. D, Line 27, Col. 1	$ 539,354	$ 581,132	$(41,778)
HCFA 1728, Sch. D, Line 27, Col. 2	38,066	-0-	38,066
TOTAL INTERIM PAYMENTS	$ 577,420	$ 581,132	$ (3,712)
Amount Due Provider (Program) Per Cost Report	$ 10,765	$ 88,071	$(77,306)
Lump-Sum Adjustments Previous Settlements	(24,367)		
NET AMOUNT DUE PROVIDER (PROGRAM)	$ (13,602)		

HHA1728.86

If you are dissatisfied with our determination and the amount of program reimbursement in controversy is at least $1,000.00, you have the right to appeal our determination. To exercise your appeal rights, a written request must be filed within one hundred and eighty (180) calendar days of the date of this Notice of Program Reimbursement. An addendum is enclosed with this letter that outlines the procedures for filing an appeal.

Enclosed you will find your copy of the revised Medicare cost report and related documents. If page two of this Notice of Program Reimbursement reflects an amount due to your facility, a check for that amount will be issued within fifteen (15) days. If an amount is due to the Medicare program, a request for repayment accompanies this notice. That letter explains the conditions governing interest assessments on amounts due to the Medicare program.

If our examination of your cost report revealed items for which we were unable to make a final determination at this time, a listing of such items is enclosed. Please review this listing carefully, as these items may result in a future correction of this Notice.

Sincerely,

/s/ John N. Dart
John N. Dart
Assistant Vice President
Medicare Audit and Reimbursement

JND:slm

Enclosures: 1. Revised Medicare Cost Report with Adjustment Report
2. Listing of Identified Items Pending Final Resolution (if applicable)
3. Procedures for filing an appeal

Medicare

300 Arbor Lake Drive, Suite 900
Columbia, South Carolina 29223

March 29, 1991

Ms. Betty S. Leake
Your Home Visiting Nurse Service
5703-A Broadway
Knoxville, Tennessee 37918

RE: NOTICE OF AMOUNT OF MEDICARE PROGRAM REIMBURSEMENT FOR YOUR HOME VISITING NURSE SERVICE COST REPORTING FISCAL YEAR ENDED DECEMBER 31, 1989 PROVIDER NUMBER 44-7100

Dear Ms. Leake:

In accordance with Title 42 of the Code of Federal Regulations (42 CFR), Section 405.1803, this is your Notice of Amount of Medicare Program Reimbursement for the cost reporting period indicated above.

The issuance of this Notice establishes the date of the intermediary's determination of the amount of program reimbursement for the indicated cost reporting period. Under 42 CFR 405.1885 this determination is subject to

reopening by the intermediary, either on its own motion or at your request, at any time within three (3) years from the date of this determination to correct the amount of program reimbursement as reflected on page two of this notice. This determination may not be reopened after the expiration of this three (3) year period except as provided in 42 CFR 405.1885.(d).

The adjustments which produce a difference between the inter-mediary's determination and your initial cost report are explained on the enclosed adjustment report. The adjustment report reflects the individual adjustments made to your cost report and includes appropriate references to and citations of applicable law, regulations and general program instructions used as the basis for these adjustments. If you have any questions concerning the nature of these adjustments or the reasons for them, please contact this office.

As a result of our examination of this cost report, our determination of your Medicare reimbursement for the indicated period is as follows:

Notice of Program Reimbursement
Page Two

Your Home Visiting Nurse Service
44-7100
FYE 12/31/89

	INTERMEDIARY DETERMINATION	PROVIDER'S INITIAL REPORT	DIFFERENCE (DECREASE)
HCFA 1728-86, Wkst. B, L. 29, Col. 6	$ 692,735	$ 711,808	$(19,073)
TOTAL ALLOWABLE COST	$ 692,735	$ 711,808	$(19,073)
HCFA 1728, Sch. D, Line 26A, Col. 1	$ 628,003	$ 686,513	$(58,510)
HCFA 1728, Sch. D, Line 26A, Col. 2	35,297	36,410	(1,113)
Sequestration Adjustment	(2,890)	(2,991)	101
Protested Amounts	-0-	11,431	(11,431)
TOTAL MEDICARE REIMBURSABLE COST	$ 660,410	$ 731,363	$(70,953)
Less Amount Received and Receivable Through Interim Payments:			
HCFA 1728, Sch. D, Line 27, Col. 1	$ 705,474	$ 705,474	$ -0-
HCFA 1728, Sch. D, Line 27, Col. 2	-0-	-0-	-0-
TOTAL INTERIM PAYMENTS	$ 705,474	$ 705,474	$ -0-
Amount Due Provider (Program) Per Cost Report	$ (45,064)	$ 25,889	$(70,953)
Lump-Sum Adjustments Previous Settlements	27,094		
NET AMOUNT DUE PROVIDER (PROGRAM)	$ (17,970)		

HHA1728.86

If you are dissatisfied with our determination and the amount of program reimbursement in controversy is at least $1,000.00, you have the right to appeal our determination. To exercise your appeal rights, a written request must be filed within one hundred and eighty (180) calendar days of the date of this Notice of Program Reimbursement. An addendum is enclosed with this letter that outlines the procedures for filing an appeal.

Enclosed you will find your copy of the revised Medicare cost report and related documents. If page two of this Notice of Program Reimbursement reflects an amount due to your facility, a check for that amount will be issued within fifteen (15) days. If an amount is due to the Medicare program, a request for repayment accompanies this notice. That letter explains the conditions governing interest assessments on amounts due to the Medicare program.

If our examination of your cost report revealed items for which we were unable to make a final determination at this time, a listing of such items is enclosed. Please review this listing carefully, as these items may result in a future correction of this Notice.

Sincerely,

/s/ John N. Dart
John N. Dart
Assistant Vice President
Medicare Audit and Reimbursement

JND:slm

Enclosures: 1. Revised Medicare Cost Report with Adjustment Report
2. Listing of Identified Items Pending Final Resolution (if applicable)
3. Procedures for filing an appeal

Medicare

300 Arbor Lake Drive, Suite 900
Columbia, South Carolina 29223

March 29, 1991

Ms. Betty S. Leake
Your Home Visiting Nurse Service
5703-A Broadway
Knoxville, Tennessee 37918

RE: NOTICE OF AMOUNT OF MEDICARE PROGRAM REIMBURSEMENT FOR YOUR HOME VISITING NURSE SERVICE COST REPORTING FISCAL YEAR ENDED DECEMBER 31, 1989 PROVIDER NUMBER 44-7234

Dear Ms. Leake:

In accordance with Title 42 of the Code of Federal Regulations (42 CFR), Section 405.1803, this is your Notice of Amount of Medicare Program Reimbursement for the cost reporting period indicated above.

The issuance of this Notice establishes the date of the inter-mediary's determination of the amount of program reimbursement for the indicated cost reporting period. Under 42 CFR 405.1885 this determination is subject to

reopening by the intermediary, either on its own motion or at your request, at any time within three (3) years from the date of this determination to correct the amount of program reimbursement as reflected on page two of this notice. This determination may not be reopened after the expiration of this three (3) year period except as provided in 42 CFR 405.1885.(d).

The adjustments which produce a difference between the inter-mediary's determination and your initial cost report are explained on the enclosed adjustment report. The adjustment report reflects the individual adjustments made to your cost report and includes appropriate references to and citations of applicable law, regulations and general program instructions used as the basis for these adjustments. If you have any questions concerning the nature of these adjustments or the reasons for them, please contact this office.

As a result of our examination of this cost report, our determination of your Medicare reimbursement for the indicated period is as follows:

Your Home Visiting Nurse Service 44-7234 FYE 12/31/89	INTERMEDIARY DETERMINATION	PROVIDER'S INITIAL REPORT	DIFFERENCE (DECREASE)
HCFA 1728-86, Wkst. B, L. 29, Col. 6	$1,143,935	$1,169,034	$(25,099)
TOTAL ALLOWABLE COST	$1,143,935	$1,169,034	$(25,099)
HCFA 1728, Sch. D. Line 26A, Col. 1	$ 983,038	$1,055,353	$(72,315)
HCFA 1728, Sch. D. Line 26A, Col. 2	86,188	88,784	(2,596)
Sequestration Adjustment	(4,657)	(4,822)	165
Protested Amounts	-0-	19,131	(19,131)
TOTAL MEDICARE REIMBURSABLE COST	$1,064,569	$1,158,446	$(93,877)
Less Amount Received and Receivable Through Interim Payments:			
HCFA 1728, Sch. D, Line 27, Col. 1	$1,049,517	$ 1,049,517	$ -0-
HCFA 1728, Sch. D, Line 27, Col. 2	103	-0-	103
TOTAL INTERIM PAYMENTS	$1,049,620	$ 1,049,517	$ 103
Amount Due Provider (Program) Per Cost Report	$ 14,949	$ 108,929	$(93,980)
Lump-Sum Adjustments Previous Settlements	(38,644)		
NET AMOUNT DUE PROVIDER (PROGRAM)	$ (23,695)		

If you are dissatisfied with our determination and the amount of program reimbursement in controversy is at least $1,000.00, you have the right to appeal our determination. To exercise your appeal rights, a written request must be filed within one hundred and eighty (180) calendar days of the date of this Notice of Program Reimbursement. An addendum is enclosed with this letter that outlines the procedures for filing an appeal.

Enclosed you will find your copy of the revised Medicare cost report and related documents. If page two of this Notice of Program Reimbursement reflects an amount due to your facility, a check for that amount will be issued within fifteen (15) days. If an amount is due to the Medicare program, a request for repayment accompanies this notice. That letter explains the conditions governing interest assessments on amounts due to the Medicare program.

If our examination of your cost report revealed items for which we were unable to make a final determination at this time, a listing of such items is enclosed. Please review this listing carefully, as these items may result in a future correction of this Notice.

Sincerely,

/s/ John N. Dart
John N. Dart
Assistant Vice President
Medicare Audit and Reimbursement

JND:slm

Enclosures:
1. Revised Medicare Cost Report with Adjustment Report
2. Listing of Identified Items Pending Final Resolution (if applicable)
3. Procedures for filing an appeal

Town Home Nursing Agency
Schedule of Prorated Amounts
2-7-79

PREPARED BY
APPROVED BY

	Office	Provider No.		Prorated Owners Salary			
1							
2							
3	Rockville	44-7120		11431			
4							
5	Mercerstown	44-7230		5675			
6							
7	Kingston	44-7240		10229			
8							
9	Speedville	44-7250		17131			
10							
11							
12							
13							
14	Note: Above providers were prorated by adjustment to owners						
15							
16	Computation made on the Home office Cost report.						
17							
18							
19							
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39							

MEDICARE ADJUSTMENTS TO EXPENSES

SCHEDULE C
page 2 of 2

Home Office: YHVNS Inc - Holding Co

Reporting Period from: 1/1/89 to: 12/31/89

Description	*	Amount	Account to be Adjusted (from Schedule B, col. 1) Line	Account
		1	2	3
20. Miscellaneous Income	B	(645)	24	Miscellaneous
21. Amount paid to Southland disallowed in previous year	A	71555	24	Miscellaneous
22.				
23.				
24.				
25.				
26.				
27.				
28.				
29.				
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31.				
32.				
33.				
34.				
35.				
36.				
37.				
38.				
39.				
40. Total		(71014)		

* Basis of Adjustment
A - cost
B - revenue received if related cost is unknown (cost recovery items)

FORM HCFA-287-82.

MEDICARE ADJUSTMENTS TO EXPENSES

Home Office: YHVNS Inc.- Holding Co.

Reporting Period from: 1/1/89 to: 12/31/89

Description	•	Amount	Account to be Adjusted (from Schedule B col. 1) Line	Account
		1	2	3
federal/state income tax, franchise tax, and related interest & penalties on late payments (HCFA-Pub. 15-I, section 2122.2)	A	(3403)	15	Taxes / Licenses
donations (See HCFA Pub. 15-I, Chapter 6)				
stock transfers and registrations (HCFA-Pub. 15-I, section 2134.9)				
acquisition expenses (HCFA-Pub. 15-I, section 2134.11)				
disposal expenses re: nonpatient care assets or subsidiaries (HCFA-Pub. 15-I, section 2102.3)				
bad debts (HCFA-Pub. 15-I, section 308)				
life insurance premiums where home office is direct/indirect beneficiary (HCFA-Pub. 15-I, section 2130)				
annual stockholder meeting expenses (HCFA-Pub. 15-I, section 2134.9)				
nonhealth care projects (HCFA Pub. 15-I, section 2102.3)				
noncompetition agreement expenses (HCFA-Pub. 15-I, sections 2105.1/1218.7)				
fundraising expenses (HCFA-Pub. 15-I, section 2136.2)				
rebates/refunds on expenses (HCFA-Pub. 15-I, section 804)				
interest income on unrestricted funds (HCFA-Pub. 15-I, section 224.2)				
cost of ownership of assets leased from related organization in lieu of rent (HCFA-Pub. 15-I, section 1006)				
related organizations (from Schedule D, Part B, col. 5, line 15 (HCFA-Pub. 15-I, section 1000)				
Others (specify) Owners Compensation B Locke	A	(11103)	2	Salaries - Others
Owners Compensation R. Locke	A	(37787)	2	Salaries - Others
Amortization of Goodwill	A	(1096)	20	Amort. Goodwill
IRS Interest	A	(1695)	18	Interest Expense

FORM HCFA-287-82

STATEMENT OF ALLOWABLE COSTS — Home Office: YAVNS. INC - Holding Co. — Reporting Period from: 1/1/89 to: 12/31/89

Account Description	Expenses per Home Office books	Medicare Adjustments (from Sch.C)	Allowable Expenses (col. 1 minus col. 2)	Direct Allocations: chain components (from Sch.E)	Direct Allocations: regional offices* (from Sch. E)	Functional Allo: chain components (from Sch.F)	Functional Allo: regional offices* (from Sch.F)	cols. 4
	1	2	3	4	5	6	7	
1. salaries - officers	423436	(37787) (11103)	374046			(25291)		3
2. salaries - others								
3. payroll taxes	27539		27539			(2048)		2549
4. employee benefits	145981		145981			(7124)		13881
5. profit sharing/pension plans								
6. travel/entertainment	8459		8459					845
7. automobile								
8. depreciation/amortization	6401		6401					640
9. building rental	22476		22476					2247
10. equipment rental	8405		8405					840
11. utilities	4570		4570					457
12. legal and accounting	73837		73837					7383
13. telephone/telegraph	31223		31223					3122
14. insurance	65848		65848					6584

FORM HCFA-287-82

FORM APPROVED
OMB NO. 0938-0202

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MEDICARE ADJUSTMENTS TO EXPENSES

SCHEDULE C
page 2 of 2

Home Office: YHUNS Inc. - Holding Co

Reporting Period from: 1/1/89 to: 12/31/89

Description	*	Amount	Account to be Adjusted (from Schedule B, col. 1) Line	Account
		1	2	3
20. Miscellaneous Income	B	(645)	24	Miscellaneous
21. Amount paid to Southland disallowed in previous year	A	31595	24	Miscellaneous
22.				
23.				
24.				
25.				
26.				
27.				
28.				
29.				
30.				
31.				
32.				
33.				
34.				
35.				
36.				
37.				
38.				
39.				
40. Total		(31014)		

* Basis of Adjustment
A - cost
B - revenue received if related cost is unknown (cost recovery items)

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MEDICARE ADJUSTMENTS TO EXPENSES — SCHEDULE C, page 1 of 2

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Name
Office: YHVNS Inc.- Holding Co.

Reporting Period from: 1/1/89 to: 12/31/89

Description	*	Amount	Account to be Adjusted (from Schedule B col. 1) Line	Account
		1	2	3
federal/state income tax, franchise tax, and related interest & penalties on late payments (HCFA-Pub. 15-I, section 2122.2)	A	(3403)	15	Taxes / Licenses
donations (See HCFA Pub. 15-I, Chapter 6)				
stock transfers and registrations (HCFA-Pub. 15-I, section 2134.9)				
acquisition expenses (HCFA-Pub. 15-I, section 2134.11)				
disposal expenses re: nonpatient care assets or subsidiaries (HCFA-Pub. 15-I, section 2102.3)				
bad debts (HCFA-Pub. 15-I, section 308)				
life insurance premiums where home office is direct/indirect beneficiary (HCFA-Pub. 15-I, section 2130)				
annual stockholder meeting expenses (HCFA-Pub. 15-I, section 2134.9)				
nonhealth care projects (HCFA Pub. 15-I, section 2102.3)				
noncompetition agreement expenses (HCFA-Pub. 15-I, sections 2105.1/1218.7)				
fundraising expenses (HCFA-Pub. 15-I, section 2136.2)				
rebates/refunds on expenses (HCFA-Pub. 15-I, section 804)				
interest income on unrestricted funds (HCFA-Pub. 15-I, section 224.2)				
cost of ownership of assets leased from related organization in lieu of rent (HCFA-Pub. 15-I, section 1006)				
related organizations (from Schedule D, Part B, col. 5, line 15 (HCFA-Pub. 15-I, section 1000)				
16. Others (specify) Owners Compensation B Locke	A	(11103)	2	Salaries - Others
17. Owners Compensation R. Locke	A	(37787)	2	Salaries - Others
18. Amortization of Goodwill	A	(1096)	20	Amort. Goodwill
19. IRS Interest	A	(1675)	18	Interest Expense

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FORM HCFA-287-82

STATEMENT OF ALLOWABLE COSTS — Home Office: YAVNS. INC - Holding Co. — Reporting Period from: 1/1/89 to: 12/31/89

Account Description	Expenses per Home Office books	Medicare Adjustments (from Sch.C)	Allowable Expenses (col. 1 minus col. 2)	Direct Allocations: chain components (from Sch.E)	Direct Allocations: regional offices* (from Sch. E)	Functional Allo: chain components (from Sch.F)	Functional Allo: regional offices* (from Sch.F)	cols. 4, 5
	1	2	3	4	5	6	7	8
1. salaries - officers	922936	(37787) (11103)	874046			(25299)		374[illegible]
2. salaries - others								
3. payroll taxes	27329		27539			(2048)		25491
4. employee benefits	145989		145989			(7124)		138865
5. profit sharing/pension plans								
6. travel/entertainment	8459		8959					8959
7. automobile								
8. depreciation/amortization	6401		6401					6401
9. building rental	22476		22476					22476
10. equipment rental	8405		8405					8405
11. utilities	4570		4570					4570
12. legal and accounting	73837		73837					72837
13. telephone/telegraph	31223		31223					31223
14. insurance	65848		65848					65848

FORM HCFA-287-82

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

YOUR HOME VISITING NURSE SERVICES, INC., Home Health Care Agencies, Providers licensed as numbers 44-7100, 44-7300, 44-7234 and 44-7304, (TN Corporations)	
Plaintiff,	
vs.	Civil Action No. ___
SECRETARY OF HEALTH AND HUMAN SERVICES,	
Defendant.	

COMPLAINT
(Filed May 18, 1995)

Now comes the plaintiff, Your Home Visiting Nurse Services, Inc., and its home health care agency providers, and for cause of action against the defendant, Secretary of Health and Human Services, shows the following:

1. The plaintiff corporation owns and operates four home health care agency providers which are licensed to provide medical services to qualified Medicare beneficiaries, under the Social Security Act, and to receive reimbursement from the Medicare Program for the services rendered. The four home health care agency providers are commonly owned and are operated through their

home office for business administration which is located at 5703 Broadway, Knoxville, Knox County, Tennessee.

2. The Defendant, Secretary of Health and Human Services is ultimately responsible for administration of the Medicare Program through the Health Care Financing Administration (HCFA), which contracts with insurance companies such as Blue Cross and Blue Shield of Tennessee (BCBS/TN) and Blue Cross and Blue Shield of South Carolina (BCBS/SC) to perform reimbursement and review functions in the role of fiscal intermediaries.

3. The Federal Regulation contained at 42 Code of Federal Regulation Section 421.5(b) provides that intermediaries and carriers act on behalf of HCFA in carrying out certain administrative responsibilities and that HCFA is the real party of interest in any litigation involving the administration of the program.

4. This Court has jurisdiction through 28 U.S.C. Section 1361 which confers original jurisdiction on Federal District courts to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff; 28 U.S.C. Section 1331, regarding federal question jurisdiction; and 42 U.S.C. Section 1395oo(f)(1) which grants providers such as the plaintiff's home health care agency providers herein, the right to obtain judicial review of any final decision of the Provider Reimbursement Review Board, by a civil action commenced within 60 days of the date on which notice of any final decision by the Board is received.

5. The plaintiff's providers received final determinations through Notice of Program Reimbursement letters from

the fiscal intermediary, BCBS/SC, for the cost reporting periods of 12/31/89.

6. These Notices of Program Reimbursement gave each plaintiff/provider notice of the final determination of the fiscal intermediary, BCBS/SC, of allowable cost for reimbursement from the Medicare program.

7. Due to a continued disagreement as to the correct amount of owner's compensation and the appropriate amount of Medicare reimbursement therefor, discussions concerning the issue resulted in the plaintiff acquiring additional information concerning the subject on or about March 1994.

8. The present intermediary, BCBS/SC, is now relying upon a base rate of owner's compensation for the plaintiff which was set by the previous intermediary, BCBS/TN.

9. At the time the previous intermediary, BCBS/TN, set the base rate for owner's compensation for the plaintiff, the previous intermediary had in its possession salary data for home office officers of *chain operations* for home health care agency chains.

10. The previous intermediary, BCBS/TN, did not apply the salary data for home office officers of *chain operations* to the home office officers in the plaintiff's chain operation, but instead, treated the home office officers of the plaintiff operation as if they were home office officers of one large provider.

11. Treating the home office officers of the plaintiff's chain operation as if they were home office officers of a single provider agency resulted in a lower amount of

compensation for the plaintiff's home office officers which caused an audit adjustment to reduce the allowable amount of owner's compensation.

12. The current intermediary, BCBS/SC, computes the current home office officers salary (owners compensation) in part by allowing a percentage increase from the base rate which was set by the previous intermediary.

13. The present intermediary's continued reliance upon the base rate set by the previous intermediary, BCBS/TN, results in a lower amount of compensation for the plaintiff's home office officers (the owner's compensation) for the 1989 cost reporting period and for each cost reporting period thereafter.

14. Intermediaries are required to review and apply comparable salary data when making determinations on allowable salary amounts.

15. The previous intermediary, BCBS/TN, had comparable salary data concerning home office officers of chain operations, but did not apply that data to the plaintiff's home office officers of the plaintiff's chain operation.

16. Upon discovery of this new information, the plaintiff requested reopening of the 1989 cost report within the three year time period stated in 42 Code of Federal Regulations Section 405.1885 for correction to the adjustments for owner's compensation in the amount of ‹$48,890›. (Exhibit A)

17. On April 21 1994, the present intermediary, BCBS/SC, denied the request to reopen. (Exhibit B)

18. On October 14, 1994, the plaintiff requested review of the intermediary's refusal to reopen by the Provider Reimbursement Review Board, citing the intermediary's refusal to reopen as an abuse of discretion. (Exhibit C)

19. On March 21, 1995 the plaintiff received the final determination of the Provider Reimbursement Review Board which found that the Board did not have jurisdiction over this appeal and dismissed the case but noted that the determination was subject to the provisions of 42 U.S.C. Section 1395(f) which states that providers shall have the right to obtain judicial review of any final decision of the Board by a civil action commenced within 60 days of the date on which notice of any final decision by the Board is received. (Exhibit D)

20. As a result of the Board decision, this complaint, requesting judicial review of the Board's dismissal, is being filed within 60 days of receipt of the Board decision.

WHEREFORE, the plaintiff requests that this Court remand this case to the Provider Reimbursement Review Board for a decision on the issue of the intermediary's abuse of discretion as alleged in the Request for Review by the Provider Reimbursement Review Board, or in the alternative, to order the intermediary, to reopen the 1989 cost report to correctly apply the comparable salary for home offices officers for chain operations of home health care agencies to the base year information being relied upon and to make such corrections to the following cost reporting periods as necessary to reverse the audit adjustment to owner's compensation and to pay the plaintiff

$48,890, plus interest, and such other relief as the Court may deem reasonable and just.

Respectfully submitted this the 18th day of May, 1995.

/s/ Diana L. Gustin
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

YOUR HOME VISITING NURSE SERVICES, INC. Plaintiff, vs. DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES Defendant.	)	NO. 3:95-CV-276 JUDGE JORDAN

MOTION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Secretary of Health and Human Services, and respectfully moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In the alternative, the Secretary moves for Summary Judgment pursuant to Fed. R. Civ. P. 56. A memorandum in support of this motion and a transcript of administrative proceedings are attached.

Respectfully submitted,

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